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No. 91-1674

In the Supreme Court of the United States

OCTOBER TERM, 1991

STAR MARKET COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether both courts below erred in finding that petitioner was provided notice of the election protest and an opportunity to be heard.

2. Whether the district court had jurisdiction under the All Writs Act, 28 U.S.C. 1651, to enforce the consent decree entered in this case against actions by third parties that threatened that decree.

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. A7-A23) is reported at 954 F.2d 801. The district court's opinion (Pet. App. A24-A42) is reported at 776 F. Supp. 144.

JURISDICTION

The court of appeals' decision was entered on January 22, 1992. The petition for a writ of certiorari was filed on April 21, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. In June 1988, the United States filed a civil action under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, against the International Brotherhood of Teamsters (IBT) and members of the IBT General Executive Board. The complaint alleged that the IBT had long been under the control of organized crime, and sought equitable relief to rid the union of such control. See Pet. App. 10; *United States* v. *IBT*, 905 F.2d 610, 612-613 (2d Cir. 1990). In March 1989, the parties agreed to settle the action and stipulated to the entry of a consent decree incorporating the terms of their settlement agreement. Pet. App. A10.

The principal goal of the settlement and the consent decree is to wrest the union from the influence of organized crime and to establish a new system of rank-and-file elections. Pet. App. A10; *United States* v. *IBT*, 948 F.2d 98, 100 (2d Cir. 1991) (*Yellow Freight*); *United States* v. *IBT*, 931 F.2d 177, 180-181 (2d Cir. 1991). Pursuant to the consent decree, the district court appointed three officers: an Independent Administrator to oversee the decree's remedial provisions; an Investigations Officer to investigate and prosecute disciplinary charges against corrupt IBT members; and an Election Officer to oversee and certify the election process. Pet. App. A43-A49; *United States* v. *IBT*, 941 F.2d 1292, 1294 (2d Cir. 1991); *United States* v. *IBT*, 905 F.2d at 613. The authority of all three officers, with certain limited exceptions, expired with the certification of the 1991 union election results. Consent Decree 3-4.

The consent decree empowered the Election Officer to "supervise" the 1991 IBT election process. Pet. App. A49. The district court that entered the decree determined that the Election Officer's supervisory powers include the "right to promulgate electoral rules and

procedures." *United States* v. *IBT*, 723 F. Supp. 203, 207 (S.D.N.Y.), appeal dismissed, No. 89-6252 (2d Cir. 1989), cert. denied, 496 U.S. 925 (1990). Pursuant to that authority, the Election Officer proposed a set of Election Rules to govern the 1991 election and submitted the Rules to the district court for approval. The district court modified the Rules and adopted them as an order of the court, declaring the Election Rules to be the "linchpin" to the enforcement of the Consent Decree. *United States* v. *IBT*, 742 F. Supp. 94, 97 (S.D.N.Y. 1990), aff'd, 931 F.2d 177 (2d Cir. 1991); see also Pet. App. A25. The district court held that the court-adopted Election Rules "shall be enforceable upon pain of contempt." *United States* v. *IBT*, 742 F. Supp. at 108.

The Election Rules protect the rights of IBT members to participate in union election campaign activities. Pet. App. A25, A32 n.2. The Rules also set out a process for expeditiously raising and adjudicating election protests. Pet. App. A207-A211. Under that process, protests concerning the election and any alleged improper or inequitable treatment of a candidate or his/her supporters must be filed with the Election Officer, and the Election Officer then determines the merits of the protest and the appropriate remedy. Pet. App. A208-A209. Any party adversely affected by a determination may seek a hearing before the Independent Administrator. If no hearing is requested, the Election Officer's determination becomes final and binding. Pet. App. A209-A210. If a hearing is requested, the Independent Administrator conducts it and thereafter issues a written decision. That decision may be appealed to the district court. Pet. App. A210.

2. Neal J. Henderson is a member of the IBT and was employed by petitioner as a warehouseman. In Spring 1991, Henderson was elected as a delegate to the IBT convention on a slate supporting Ron Carey for IBT president. Petitioner's supervisors made disparaging

remarks to Henderson regarding his candidacy for delegate and his pro-Carey campaign activities. Pet. App. A26.

On May 2, 1991, Henderson accepted an overtime assignment, from 7:00 p.m. to 9:25 p.m., before his designated shift, which began at 10:00 p.m. It was the practice of petitioner's employees working pre-shift overtime to leave early if they completed their work. Thus, after Henderson finished his overtime assignment at 9:00 p.m. and checked whether his co-workers needed his assistance, he left the facilities. When he returned at 10:00 p.m. to begin his regular shift, he was suspended by his supervisor. On May 13, petitioner terminated Henderson because he "stole company time" by leaving early on his break on May 2. Pet. App. A26-A27.

3. Henderson filed a grievance against petitioner pursuant to the collective bargaining agreement, alleging that his termination violated the labor contract overtime provisions. Henderson also filed a protest with the Election Officer, contending that his termination was politically motivated and violated the Election Rules. The Election Officer informed petitioner about the grievance and asked petitioner to supply "all information relevant to the allegations contained in the protest." Pet. App. A140-A141. The Election Officer deferred further action until the contractual grievance-arbitration proceeding was completed. On July 17, 1991, the arbitrator ruled that petitioner was justified in discharging Henderson. The arbitrator's decision was solely based upon the collective bargaining agreement's overtime provisions and did not address whether Henderson was terminated for political reasons or whether the termination violated the Election Rules. Pet. App. A27, A35, A133-A134.

After the arbitration decision was issued, the Election Officer proceeded with the investigation and found that it was common practice for petitioner's employees to leave

the premises when finishing their work before the overtime period ended, and that Henderson was the only person ever fired for doing so. Further, the Election Officer discovered that Henderson's punishment was far more severe than those imposed on other employees for similar infractions. Pet. App. A27-A28. In September 1991, the Election Officer issued a decision finding that petitioner had discriminated against Henderson because of his election activities. The Election Officer directed petitioner to reinstate Henderson with full back pay. Pet. App. A28.

Petitioner sought a hearing under the Election Rules before the Independent Administrator to review the Election Officer's determination. By consent of the parties, the hearing was held in the form of a telephone conference. Pet. App. A13. On September 18, 1991, the Independent Administrator issued a written decision agreeing with the determination of the Election Officer. Pet. App. A137-A145.

The Independent Administrator rejected petitioner's threshold challenge to his jurisdiction to enforce the Elections Rules against an employer. Pet. App. A139. Further, the Independent Administrator ruled that the Election Officer had jurisdiction independent of the arbitrator to enforce the Election Rules. Pet. App. A141-A142. The Independent Administrator also rejected petitioner's complaint that it was denied "due process." The Independent Administrator explained that the Election Officer provided petitioner notice of the protest in May 1991 and asked petitioner to submit all relevant information. Pet. App. A139-A141.

On the merits, the Independent Administrator agreed with the Election Officer that Henderson's support of Ron Carey had been a "motivating factor" in the discharge. Pet. App. A143. The Independent Administrator held that petitioner had failed to show that Henderson

would have been discharged for cause notwithstanding his political activity. The Independent Administrator noted that the evidence had established that Henderson's sanction was far more severe than ordinary and that other employees who had also left pre-shift overtime early the same night as Henderson received no discipline whatsoever. Pet. App. A144. The Independent Administrator concluded that the only explanation for petitioner's actions was retaliation for Henderson's political activities and support of Carey. Pet. App. A144-A145.

4. Petitioner did not appeal the Independent Administrator's decision to the district court, but instead informed the government that it would not comply with the decision. Pet. App. A29. On October 24, 1991, the government filed a motion asking the court to affirm the Independent Administrator's decision and to direct petitioner to comply. *Ibid.* In response, petitioner raised a variety of objections to the Independent Administrator's decision. The district court held that petitioner had waived its objections by failing to appeal, and ordered petitioner to comply or be held in civil contempt and incur a $10,000 per day sanction. Pet. App. A30-A31, A42.

The court further held that, even if petitioner had not waived its right to contest the Independent Administrator's decision, petitioner's objections were "wholly without merit." Pet. App. A31. First, rejecting petitioner's personal and subject matter jurisdiction arguments, the court held that it had authority under the All Writs Act, 28 U.S.C. 1651, to enforce the consent decree and Election Rules against third parties who could jeopardize the fair and free elections mandated by the decree. Pet. App. A31-A33. Second, the court held that there was no violation of "due process" because the Election Officer and Independent Administrator are not state actors and because petitioner was provided ample notice and an adequate opportunity to be heard. Pet. App. A33-A34.

Third, the court held that the arbitrator's decision was not binding on the Election Officer because the Election Rules provide an independent source of rights and the arbitrator's inquiry whether the collective bargaining agreement overtime provisions were violated was entirely distinct from the inquiry into whether Henderson was terminated because of his election activities. Pet. App. A34-A36. Fourth, the court rejected the argument that the Election Officer's determination was untimely under the Election Rules. Pet. App. A36-A37. Finally, the court affirmed the Independent Administrator's decision, finding that it was "fully supported by the record." Pet. App. A37-A39.

5. Petitioner appealed to the Second Circuit, which affirmed. Pet. App. A7-A23. The court of appeals rejected petitioner's first argument that the Independent Administrator's decision violated due process. The court, relying on its earlier ruling in *United States* v. *IBT*, 941 F.2d 1292 (2d Cir. 1991), cert. denied *sub nom. Senese* v. *United States*, 112 S. Ct. 1161 (1992), held that, because the Independent Administrator was not a "state actor," his actions were not governed by the Due Process Clause of the Constitution. However, the court explained that the "state actor" issue was not significant in this case, because petitioner was entitled to procedures that would satisfy the Due Process Clause before it was sanctioned under the All Writs Act. Pet. App. A14-A15. The court held that petitioner received such procedures in this case, because it received: timely notice of the protest; more than three months to supply the Election Officer with any relevant information; an opportunity to challenge the Election Officer's determination before the Independent Administrator; the right to a hearing before the Independent Administrator; the opportunity to submit written submissions to the Independent Administrator; and the right to appeal the Independent

Administrator's decision to the district court. Pet. App. A15-A16. The court of appeals further ruled that petitioner waived any due process objections by failing to appeal to the district court. Pet. App. A16-A17.

The court of appeals also rejected petitioner's argument that the Independent Administrator's decision could not "overrule" the decision of the arbitrator. The court, adhering to its decision in *Yellow Freight*, 948 F.2d at 103-106, held that to the extent necessary to implement the consent decree and Election Rules, the Independent Administrator and the district court could properly assert jurisdiction over matters that may also be subject to arbitration under the collective bargaining agreement. Pet. App. A17-A19. The court relied on the established principle that a federal court need not defer to an arbitration decision when a plaintiff's labor-related claim stems from a separate source of legal rights. Pet. App. A19-A21.

The court further noted that the arbitrator's decision in any event did not address the retaliation claim. The court concluded that the Independent Administrator thus correctly refused to grant the arbitrator's ruling conclusive effect. Pet. App. A21. The court added that, because the objectives and scope of the consent decree differed dramatically from those addressed by the collective bargaining agreement, it was "consistent with federal labor policy" that the "Consent Decree officers and the district court remain free to complete their task unencumbered by collateral arbitration results." Pet. App. A22-A23.

ARGUMENT

Petitioner challenges the adequacy of process it was afforded in this case and argues that the enforement of the consent decree and the Election Rules improperly displaced the roles of the arbitrator and the National

Labor Relations Board (NLRB). Petitioner's claims arise under the unique and temporary regime established by the 1989 consent decree and the 1991 Election Rules. Under the terms of the decree, the authority of the court-appointed officials, with limited exceptions, expired in January 1992 with the certification of the 1991 IBT election results. Consent Decree 3-4. Similarly, the Election Rules also expired with the certification of the 1991 IBT election results. Petitioner does not assert that the decision of the court of appeals conflicts with the decisions of any other court of appeals. Accordingly, this case presents no issue of general or continuing importance warranting further review by this Court.

1. Petitioner's primary contention appears to be that it did not receive adequate notice of the charges against it before the Election Officer; that it did not in fact receive such notice until the United States had moved to hold it in contempt; and that the lack of notice deprived it of a fair opportunity to contest the charges against it. Pet. i, 5-8, 10, 11, 13, 14. Both courts below, as well as the Independent Administrator, determined that petitioner was in fact afforded sufficient notice of the charges against it. Pet. App. A16, A34, A140-A141. Those fact-bound determinations were correct and would not in any event warrant further review.

Insofar as petitioner also complains about other alleged shortcomings of the process, petitioner's complaints similarly are not well-taken. As both courts below found, the record establishes that petitioner was provided with all of the elements of due process. Petitioner was afforded more than three months to present information to the Election Officer. Pet. App. A16, A33-A34. Petitioner had a further opportunity for a hearing before the Independent Administrator, and petitioner took advantage of that opportunity when it consented to

and participated in a telephone hearing and submitted supporting written materials. Pet. App. A13, A16. Finally, petitioner had ample opportunity for district court review of the Independent Administrator's decision. Pet. App. A14, A16. Due process requires no more.

2. Petitioner waived any right to challenge the authority of the Independent Administrator and the district court. Petitioner submitted to the Election Rule remedial scheme and invoked its right to review and a hearing under the Election Rules. Now, having received an adverse decision by the Independent Administrator, petitioner attempts to collaterally challenge the authority of the district court and the court-appointed officers. However, having submitted itself to the equitable jurisdiction of the district court and the court-appointed officers, petitioner cannot now collaterally contest their equitable authority. Cf. *Langenkamp* v. *Culp*, 111 S. Ct. 330, 331 (1990) (per curiam) (a party who submits to the equitable jurisdiction of the bankruptcy court cannot contest the court's equitable authority to resolve the trustee's claims against it); *Katchen* v. *Landy*, 382 U.S. 323, 327 (1966) (same).

3. a. Petitioner also claims (Pet. 17-22) that the district court's authority under the All Writs Act to issue process to enforce its orders was not properly exerted in this case. In particular, petitioner claims that the district court should have deferred to the decision of the labor arbitrator.

The court of appeals recognized the importance of arbitration of labor disputes, but correctly held that a court is not required to defer to an arbitrator where an employee asserts rights legally independent of the collective bargaining agreement or the National Labor Relations Act, 29 U.S.C. 151-169. Pet. App. A16-A23. That principle is well-established under this Court's precedents. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S.

36, 52 (1974); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). An employee can seek to vindicate federal rights associated with his employment relationship in court, as long as those rights are not dependant upon the collective bargaining agreement or the NLRA. See, *e.g.*, *McDonald* v. *City of West Branch*, 466 U.S. 284, 292 (1984) (42 U.S.C. 1983); *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 745 (1981) (Fair Labor Standards Act); *Alexander*, 415 U.S. at 59-60 (Title VII of the Civil Rights Act of 1964).

In this case, the election protest dispute did not arise under the collective bargaining agreement or the NLRA. Rather, it involved an alleged violation of an Election Rule. The district court overseeing the RICO consent decree believed that the Election Rules were critical to the effectuation of the decree. Pet. App. A25. In order to ensure that the decree was carried out and could not be subverted by the interference of third parties, the district court entered the Election Rules as court orders that would be enforceable under the pain of contempt. *United States* v. *IBT*, 742 F. Supp. at 108. The court-ordered election rules provide an independent source of law that can be enforced by the district court, notwithstanding the arbitrator's decision. See Pet. App. A20-A21. Indeed, the arbitrator did not purport to address the question in dispute under the Election Rules—whether Henderson's termination was motivated by his election and campaign activities. Pet. App. A21, A133-A134. The court of appeals' decision that, in the unusual circumstances of this case, the district court was not bound by the arbitrator's ruling was thus correct.*

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* Petitioner asserts that its argument is supported by this Court's decision in *Presley* v. *Etowah County Commission*, 112 S. Ct. 820 (1992). Contrary to petitioner's statement, *Presley* did not involve an effort "to enlarge the scope of a consent decree

b. Petitioner also claims (Pet. 16-17) that the courts below should have allowed the NLRB to resolve this dispute. Petitioner did not advance that claim before the court of appeals. In the court of appeals, petitioner argued that the district court should have deferred to the arbitrator or should have been bound by the arbitrator's decision; petitioner did not argue that the NLRB was the exclusive or even the proper forum to resolve this dispute. See Pet. C.A. Br. 28-35. Because petitioner failed to present its argument to the court of appeals, further review to address that argument would be unwarranted. See *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

Moreover, as explained by the court of appeals in its *Yellow Freight* decision, the NLRB does not have exclusive jurisdiction over matters pertaining to or necessary for the enforcement of this RICO consent decree. *Yellow Freight*, 948 F.2d at 105-106. The principle case relied upon by petitioners, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), is not to the contrary. Pet. 16-17. *Garmon* holds that state regulations must ordinarily yield to the NLRB's primary jurisdiction over unfair labor practice disputes. *Garmon* does not address the enforcement of independent federal rights that flow from the Consent Decree or the scope of a district court's power to enforce that decree under the All Writs Act. Nothing in the

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originally arising under the Voting Rights Act, 42 U.S.C. § 1973c." Pet. 20. Instead, *Presley* addressed the question whether a change affecting "only the allocation of power among governmental officials" must be precleared under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. 112 S. Ct. at 832. Although one of the parties in *Presley* had been subject to a consent decree, see 112 S. Ct. at 825, this Court's decision in *Presley* had nothing to do with the application or enforcement of the decree.

court's order in this case precludes the enforcement of rights under the NLRA by the NLRB.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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